United Nations A/CN.9/820

General Assembly

Distr.: General
24 January 2014

Original: English

United Nations Commission on International Trade Law
International Colloquium on Public-Private Partnerships
Vienna, 3-4 March 2014

Possible future work in Public-Private Partnerships

Discussion paper — Part II

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III. Main issues for further work on PPPs (*continued*)

B. Key topics for inclusion in a PPPs legislative text (*continued*)

2. Project planning, including the allocation of risk and government support

(i) Project planning and preparation

Relevant Legislative Recommendations, MLPs: none

Legislative Guide: Section D.1, "Co-ordination of preparatory measures", in Chapter I, "General Legislative and Institutional Framework"

1. The PFIPs Instruments provide general guidance on project planning and preparation, outlining important elements of good practice and emphasising in particular the importance of feasibility studies. The guidance stresses that the latter should include "economic and financial aspects such as expected economic advantages of the project, estimated cost and potential revenue anticipated from the operation of the infrastructure facility and the environmental impact of the project".[1]

2. The experts advise that these provisions are, however, insufficient, given the evidence of unacceptable rates of failure in PPPs in developing countries (estimated to exceed 50 per cent after only 2 years of project operation). They note that the costs of effective planning and preparation are not adequately accounted for in government budgets and many countries do not evaluate such costs prior to commencing a project. They add that an estimated US$ 1 billion is needed for annual preparation costs for all World Bank PPPs in Africa, of which most should be applied towards feasibility studies, but in practice under US$ 50 million is spent on such studies. Moreover, the expenditure is applied in an uneven manner, without coordination among the many sectors involved. The situation is reported to be compounded by poor governance and vested interests. Practitioners cite the lack of an appropriate framework for project planning and project preparation as one of major weaknesses of PPP institutional frameworks (addressed in Part I of this paper) and PPP laws generally. Hence the experts consider that a more detailed and prescriptive approach is needed in any future legislative text on PPPs.

3. The experts also advise that savings from avoiding project failure would far outweigh the costs of good planning and preparation, and that the experience of the international financial institutions and practitioners in planning and preparation policies at the national and international levels could be harmonized and aggregated to a large extent. Lessons learned from this experience and that of related working groups[2] could help formalize good practices applicable to all forms of PPPs and to all parties to them, and standards and guidance that could be applied widely.

4. The planning and preparation steps that could be addressed include: (1) Development of a (medium-term) master plan for infrastructure development, including the provision of public services; (2) Consequential prioritization of

[1] Legislative Guide, para. 25, Section D.1, "Co-ordination of preparatory measures", in Chapter I, "General Legislative and Institutional Framework".

[2] Such as the Public-Private Infrastructure Advisory Facility (PPIAF), www.ppiaf.org/.

projects based on socioeconomic objectives and considerations, financial implications, effects on sustainable development, and so on; (3) Plans for each project, to address choice of project type, based on financial and other capacity of a State or a contracting authority (traditional procurement, Design & Build, PFI/PPP, concession-type PPP); (4) Planned market assessments for each project; and (5) Evaluation by various actors of individual projects in accordance with established standards, including transparency requirements, reflecting the type of project concerned.

5. It was also suggested that plans should be published so that whether the desired socioeconomic outcomes are realized and whether the financial assessments underlying the choice of project type prove accurate can be evaluated in a transparent manner. These issues are also discussed in the sections on Transparency and Other issues, below.

6. The experts also note that more recent PPPs laws include provisions on selection, prioritization and development of projects, though there is some anecdotal evidence that these provisions are sometimes seen as a barrier to developing projects (and so contracting agencies may seek to circumvent them and to engage in non-competitive selection procedures). In addition, the importance of an infrastructure plan as noted above may assist in addressing some aspects of unsolicited proposals, as further explored in the section on that topic, below.

7. The experts advise that the recommendations in the Legislative Guide on ensuring that the relevant bodies are adequately-resourced and enabled to coordinate as appropriate on due diligence matters and financial preparation should also serve as a basis for further provision in any future legislative text on PPPs. The scope and functions of relevant institutions discussed in Part I of this paper will be a relevant consideration in this context.

(ii) Risk allocation

Relevant Legislative Recommendation 12

MLPs: none

Legislative Guide: Section B, "Project risks and risk allocation", in Chapter II, "Project risks and government support"

8. The 2013 Colloquium heard suggestions that the question of risk allocation should be afforded greater detail in any future text on PPPs, that there was too little flexibility on the topic so far as the private sector is concerned in many PPPs laws,[3] and that the Legislative Guide provides inadequate guidance on some aspects of the topic.

9. The Legislative Guide describes the various categories of project risk affecting the various parties to and stakeholders in the project, and recommends as a general principle that the party most able to prevent a risk from occurring, to bear its costs or consequences and/or to take mitigating steps should bear and manage the risk. This principle is broadly followed in other international texts on PPPs (and in the OECD Principles for the public governance of PPPs referred to above).

[3] See, also, section 3.5.1 of the Simmons and Simmons report, footnote 8 in Part I of this Discussion Paper, A/CN.9/819.

10. The experts suggest that certain risks — such as demand risk and public affordability risk — cannot easily be identified, defined and measured, and that the parties to a PPP may characterize some risks differently. The Legislative Guide also notes that some risks are endogenous to one party to a PPP only, and some are in no party's control and so cannot be managed by any party (i.e., exogenous to all parties). Hence, special arrangements for them need to be addressed in the project agreement. An example of these exogenous risks, noted by the OECD, is an uninsurable force majeure risk, such as the risk of conflict.

11. The negotiation of the project agreement and related documents will therefore be a critical factor to ensure the appropriate allocation of risk, especially where risks are difficult to define, etc., and where there are disagreements over their characterization. Risk valuation is complex, and the price paid for risk transfer in these cases will be particularly difficult to agree (and it may be a key determinant of whether a PPP eventually gives value for money). The experts suggest that stricter requirements for more thorough feasibility studies and other project planning issues may assist in better identification, definition and measurement of risks, would ease the negotiation process and therefore should be required in any future legislative text on PPPs. In addition, they recommend a more articulate link between feasibility studies and risk assessment.

12. The experts also recommend that Legislative Recommendation 12 (on risk allocation) be considered specifically when addressing the balance of contract terms in legislation and contracts (discussed in the section on this topic below), and that methods of apportionment of risks that materialize should be included in contract terms. From a public policy perspective, it is suggested that guidance should be more robust on the negative implications for the public interest where risks are in theory transferred to the private sector, though an unstated assumption that they may ultimately be borne by the contracting authority. This situation may arise if some consequences, such as service interruption, cannot be permitted to materialize in practice.

13. It has also been noted that the public sector can in some cases self-insure against risk through pooling risks that may arise in its widespread operations. In such cases, explicitly identifying and paying for specific risks may be regarded as contrary to the public interest.[4] The experts suggest that the issues in this and the preceding paragraph require further development in any future text, drawing on the various sources identified.

14. Government guarantees and other forms of support to mitigate risks (e.g. compensating those affected when a risk arises, stabilization clauses) are discussed in the Legislative Guide, together with certain policy considerations. Here, too, the experts suggest that further elaboration is required in any future text on PPPs, considering, for example, whether support should be provided in respect of risks affecting the project specifically and whether such support should not be permitted to cover risks affecting the economy as a whole. Again, they recommend that the provisions and guidance should be expressly linked to project planning.

[4] See "PPP – A Decision-maker's Guide", Michael Burnett, EIPA, 2001, page 57.

3. Selection of the project partner

(i) Selection procedures

Relevant Legislative Recommendations: 18-39

MLPs: 5-27

Legislative Guide: Chapter III, "Selection of the concessionaire"

15. The 2013 Colloquium heard that the main steps in the selection of the project operator are pre-selection, participation of consortia, methods and techniques (single-stage, two-stage, single-source, negotiations); comparison and evaluation of proposals; contract award notices; and record-keeping. These steps are conducted under fairness, transparency and competition as guiding principles; and are subject to review or challenge (this aspect is discussed in the following section). These steps and principles reflect the requirements of UNCAC.

16. It has been acknowledged that traditional tendering procedures are generally not appropriate for PPPs. The 2013 Colloquium also heard that the UNCITRAL Model Law on Public Procurement included what is in essence an updated and complete form of the selection procedure in the PFIPs Instruments. The method concerned is called Request for Proposals with Dialogue, and it is available for the procurement of complex items and services (such as infrastructure projects).

17. Each of the PFIPs Instruments contains detailed provisions on the selection procedure, and the Colloquium may consider that the provisions concerned should be consolidated for the ease of the reader, in addition to being updated to reflect the provisions on Request for Proposals with Dialogue method in the Model Law on Public Procurement.

18. This method envisages a two-step process, designed to allow for innovative solutions to technical issues, to encourage sustainable procurement, and to provide for infrastructure needs. It allows for different technical solutions to be proposed, and for interaction between the parties on technical, legal and financial issues. However, it does not address all procurement-related issues that may be relevant to PPPs projects. Key additional issues revolve around the need to define, secure and evaluate the provision of services as well as to contract for construction, how to allow for value for money assessments involving performance measurement over the project lifetime, how to accommodate the interest of stakeholders in service provision, and to address more complex negotiations than arise in public procurement — among a broader group of parties to the project, including lenders.

19. At the more detailed level, some obligations that are relatively flexible for public procurement may require further elaboration in any future legislative text on PPPs. They include the extent of disclosure of the proposed procurement contract at the solicitation stage and the need to finalize the project agreement after selection of the project operator (negotiations on the procurement contract are prohibited in the Model Law, but are contemplated in the Legislative Guide and MLP 17). The experts advise that these issues will need to be addressed in conjunction with a consideration of the contents of the project agreement (as to which, see the section on Provision in legislation or contract, below), and the extent to which amendments to contracts and step-in arrangements for the project may imply reopening competition or may involve other aspects of the procurement process. The solutions

designed to allow for transparency throughout the project discussed in the sections on Procurement Planning and Preparation above and on Transparency below may also need to be brought into the picture, such as the public declaration of the goals and objectives of the project (including stakeholder benefits), so as to allow for accountability for delivery of services as well as physical construction.

20. The 2013 Colloquium agreed that any future text on PPPs should be based on the above procurement method, so as to ensure consistency in procedures and safeguards in projects whether publicly- or privately-funded. The Colloquium may wish to include in its report to the Commission its views on this topic.

(ii) Domestic preferences

Relevant Legislative Recommendation/MLPs: none

Legislative Guide: Section B.4, "Pre-selection and domestic preferences", in Chapter III, "Selection of the concessionaire"

21. The Legislative Guide provides outline guidance on domestic preferences, noting that although many States seek to use them, such preferences give rise to many policy issues. In addition, the Legislative Guide notes that their use may be constrained by international commitments of the enacting State, and refers to the provisions in the 1994 UNCITRAL Model Law on public procurement and accompanying commentary on margins of preference. The experts note that the main reasons governments seek to use domestic preferences are to pursue their socioeconomic policy objectives, and more generally to support development goals (the link between those goals and PPPs is discussed further below, in the section on the Importance of possible future work on PPPs). In addition, domestic preferences may be an important tool for supporting PPPs with small private operators, discussed in Part I of this paper.

22. The current (2011) Model Law on Public Procurement and Guide to Enactment contain provisions on and extensive discussion of preferences and other tools that States may use to pursue these socioeconomic policy goals. Flexibility to use the tools is given to the extent that international obligations, such as those arising under the WTO Agreement on Government Procurement permit and when procuring using loans from international donors. The measures include robust transparency mechanisms, designed to ensure that potential participants in the process will understand how the goals will be implemented in the procedure, which may be in any of four stages: when deciding to limit a procurement to domestic suppliers, and when examining qualification, responsiveness and evaluating tenders. The provisions are also designed to enable States to implement sustainable procurement, using the practical tools developed by other donor agencies (such as the United Nations Environment Programme, the OECD, and others) and to allow for any mandatory requirements imposed in an individual State (such as regards environmental criteria).

23. The Colloquium may consider that any future legislative text on PPPs should follow this approach, though noting that its application in the PPPs environment is considerably more complicated than is the case in public procurement. For example, applying a domestic preference to predominantly non-price evaluation criteria and service provision is extremely difficult. In addition, the experts advise that amplified guidance will be required in the PPPs context, given the public service

obligations and their implications for all phases of the project cycle, and that it should provide clear examples such as how to use social clauses and other measures promoting social responsibility and pro-poor projects.

(iii) Review and challenge mechanisms

Relevant Legislative Recommendation: 39

MLPs: 27

Legislative Guide: Section I, "Review procedures", in Chapter III, "Selection of the concessionaire"

24. The PFIPs Instruments contain outline recommendations on review and challenge mechanisms, i.e. disputes arising out of the selection process in PPPs (separate to post-award disputes, which are addressed in the section on that topic below). Such mechanisms were noted at the 2013 Colloquium as examples of areas of PPPs regulation that would be suitable for harmonization with public procurement laws, being equally applicable in the public procurement and PPPs contexts.

25. The Model Law on Public Procurement contains a chapter with comprehensive provisions on review and challenges, implementing the core principles set out in the PFIPs Instruments. They allow three types of challenges (challenges presented to the procuring entity, and/or to an independent body and/or to the judicial authorities). The chapter also provides remedies available to aggrieved suppliers.

26. The provisions are drafted flexibly, so need to be tailored to suit the enacting State's legal system, as explained in the accompanying Guide to Enactment. They are sufficiently broad to allow investors and other parties to a PPP to use the mechanisms concerned. The chapter was designed to implement the requirements of UNCAC on review and appeals mechanisms, including a requirement for an appeal against first-instance challenge decisions.

27. The Colloquium may therefore consider that a provision allowing parties to a PPP to avail themselves of the procurement challenge mechanism should be included in any future PPPs text.

(iv) Unsolicited proposals

References: Leg Recs: Recommendations 30-35

MLPs: Provisions 20-23

Guide: Chapter III, Section E: "Unsolicited proposals", paras. 97-117

28. The experts advise that unsolicited proposals are controversial issues in most countries and that there are few examples in the last decade of projects having been satisfactorily developed as a result of unsolicited proposals.

29. They also note that, in infrastructure plus service PPPs, the scope for taking up unsolicited proposals should be limited by reference to the current guidance in the PFIPs Instruments. In summary, those provisions — which the experts consider as representing best practice — state that unsolicited proposals claiming to involve the use of new concepts or technologies may be taken up, but those claiming to address an unidentified infrastructure need should not. The reasons justifying the latter

exclusion include that the contracting authority would be unable to assess whether its needs would be met appropriately, and that the affordability of other projects included in an investment plan may be compromised (see, also, the section above on Project planning and preparation).

30. The experts note that the mere fact that an unsolicited proposal may be in the public interest (i.e., it meets a previously unidentified need) is not sufficient to permit direct negotiations without competition. They further advise that additional provision is required to address whether unsolicited proposals could ever be acceptable without any form of competition.

31. The PFIPs Instruments also provide that where the subject of an unsolicited proposal is considered to be a project in the public interest, but is not proposing new concepts or technologies, or is not protected by intellectual property or similar rights, it may proceed with the caveat that the contracting authority should initiate the normal competitive selection procedures. Here, however, recent experience indicates that a proposal that falls outside a government's infrastructure plan and consequential budgeting arrangements should not generally be considered in the public interest: special circumstances would need to exist before it may be further considered.

32. In addition, the experts agree with the Legislative Guide's recommendations that the normal selection procedures may require some modification in cases in which the proposals contain new concepts or technologies. For example, the contracting authority may publish a description of the essential output elements of the proposal, seeking competing proposals. The experts add that this procedure could include dialogue (in the sense of the procurement method described in the section on Selection procedures above), including some provision for a premium to be paid to the original proponent if it is selected. The experts note that this process is not simple, even given existing guidance on the operation of this approach,[5] and that the current provisions require some strengthening.

33. If an unsolicited proposal involves exclusive intellectual property rights, the current provisions allow the authority to negotiate directly with the proponent, though a general recommendation to seek to introduce competition, to the extent possible, is made. The experts note that, if the proposal is for a PFI/PPP, procurement laws on the procedure may apply, though they would normally permit direct negotiations (potential overlaps between procurement and PPPs laws are discussed in Part I of this paper). The experts add that further detail is required on this type of unsolicited proposal.

34. The experts conclude that, after a decade of experience, the provisions of the PFIPs Instruments overall on this topic have proven to be fair and robust. They do not recommend any fundamental amendments, but a consolidation and some strengthening of the provisions in the three instruments, updating them as necessary to reflect developments in practice. In addition to the issues mentioned above, these developments include further procedures on identifying whether a proposal is in the public interest and is "unique" in the sense of proposing new concepts or

[5] See, for example, the "Competitive Dialogue Charter, IGD January 2007, available at www.fondation-igd.org/files/pdf/The%20Competitive%20Dialogue%20Charter%20%204.pdf, and Chapter V in the Guide to Enactment of the UNCITRAL Model Law on Public Procurement.

technologies, including institutional checks and balances. As regards procedures for handling unsolicited proposals, issues such as Swiss challenges, allowing the original proponent a bid premium, reimbursement of the costs of developing the original proposal (or funding the original proponent to conduct a selection procedure) may also be addressed in any future text.

4. The project agreement and operation

(i) *Provision in legislation or contract*

Main relevant Legislative Recommendations: 12, 40

MLPs: Provision 28

Legislative Guide: Section A, "General provisions of the project agreement", in Chapter IV, "Construction and operation of infrastructure: legislative framework and the project agreement"

35. Legal certainty is recognized as a prerequisite for securing investment in PPPs. The PFIPs Instruments set out suggested contents of the project agreement, and note that the extent to which contents of the agreement are prescribed by law varies among States. Points in favour of legislative provision include consistency and reducing the scope and length of negotiations, and those in favour of contractual provision include flexibility in negotiations.

36. The experts differ on where the appropriate balance between these approaches may be. However, they agree that legal systems generally view freedom of contract as both critical for commercial transactions and in need of limitation to protect the weaker party to those transactions and the public interest. Such limitations have been in place for many decades. Examples include limitation of liability clauses by a defaulting party, consumer protection (an expanding area of law in Europe, for example, and one that may include protecting the end user of a public service), limitations on privatization and on full property rights through compulsory purchase schemes. Such provisions are found in common and civil law systems, whether or not contract law is codified, and whether or not there is a separate body of law governing public-private contractual agreements.

37. It is generally recognized that prescriptive underlying legal principles, established in advance and disseminated to all players, and key principles for contract interpretation are essential for the success of most PPPs.[6] The long-term nature of PPPs requires contractual provision on issues ranging from the right of the contracting authority to amend the contract terms or to terminate the contract, to the provision of compensation for exceptional economic circumstances and mandatory exceptional procedures if the public service is disrupted. The main characteristics of

[6] See, e.g., "A new approach to public private partnerships", HM Treasury, United Kingdom, December 2012; available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205112/pf2_infrastructure_new_approach_to_public_private_parnerships_051212.pdf. "Infrastructure productivity: How to save $1 trillion a year", McKinsey Global Institute, January 2013, available at www.mckinsey.com/insights/engineering_construction/infrastructure_productivity, which stresses the important potential for pension funds to finance public infrastructure projects and PPPs if appropriate legal framework and good practices are in place.

a public service and its scope are sometimes a major issue (examples: tariff setting, non-discrimination, continuity, adaptation).

38. On the other hand, the risk of unnecessary contractual restriction is acknowledged, though it is tempered with the notion that parties to PPPs must always be able to justify that their agreement is able to meet the interest of society and the public interest at large. Such a notion is sometime referred to as a "social licence to operate" (for example, in the mining industry).[7]

39. Proposed solutions therefore vary, in part reflecting the different considerations in concession-type PPPs and PFI/PPPs. In concession-type PPPs, poor experience in developing countries in particular indicates that there are no easy and simple negotiations: many terms, essential for the long term success of the venture, also conflict with the contract law and with the legal culture of the contracting authority. In PFI/PPPs, on the other hand, the financial aspects of the project indicate that there is less need for a large range of prescriptive or interpretative public contract law provisions for the long-term success of those projects, though only to the extent that the investment climate and investment protection regulations meet certain standards.

40. The experts advise that the PFIPs Instruments contain many elements that could form the basis of legislative provisions on contractual terms: examples include Legislative Recommendations and MLPs on obligations of the concessionaire, duration and extension of the contract, compensation for changes in legislation, amendments to the contract, termination by the contracting authority, on collection and revisions of tariffs, handling and transferring assets, transfers of controlling interests and so on. Although additional provisions would be required, there is sufficient material from the PFIPs Instruments and practice to identify principles of more or less universal nature for the success of PPPs, representing a very substantial proportion of all contractual rights and obligations in any sustainable PPP agreement.

(ii) Post-award disputes[8]

References: Legislative Recommendations 69-71

MLPs: Provisions 49, 50 and 51

Legislative Guide: Item E.6, "Recourse against decisions of the regulatory agency", in chapter I, "General Legislative and Institutional Framework"; Chapter VI: Settlement of Disputes

41. The question of dispute resolution was noted as an issue by the Commission in 2012, and the Commission also heard a recommendation UNCITRAL should develop a national system for dispute prevention and settlement, building on the provisions in Chapter VI of the Legislative Guide, and considering the appropriate forum. The Commission noted that further work on dispute resolution should follow

[7] See, for example, "Conflict and Coexistence in the Extractive Industries", Chatham House, November 2013, available at www.chathamhouse.org/publications/papers/view/195670.

[8] For disputes arising in the pre-award period, see the section on Review and challenge mechanisms.

the suggestions made at the 2007 UNCITRAL congress entitled "Modern Law for Global Commerce" (Vienna, 9-12 July 2007).[9]

42. Key recommendations made at that Congress included the development of local capacity to handle PPP disputes, and the development of a model law to include dispute resolution and preventive mechanisms. Prevention of disputes would also be supported by providing an opportunity to investors to comment on the development of rules and regulations that were applicable to them.

43. The PFIPs Instruments recommend that disputes between the contracting authority and concessionaire be settled in the project agreement; that a mechanism be established to address customers' and users' complaints, and that the concessionaire and other parties to a project should be free to choose their dispute settlement mechanism.

44. At the Congress, it was noted that the above recommendations and the guidance in the Legislative Guide are insufficient to address the many kinds of disputes that can arise in PPPs. The structure of PPPs set out in the Section on Conflicts of interest in Part I of this paper leads to a multiplicity of legal agreements, many of which are interrelated: from project agreements, shareholding/sponsor agreements, to various loan agreements, agreements relating to the design, construction and operation of a facility, consortium and subcontracting agreements and so on.

45. The 2013 Colloquium report also noted that the PFIPs Instruments were not sufficient to address these different clusters of agreements in a PPP. It emphasized that the resultant complexity of legal relationships provides significant potential for disputes, which can flow from one agreement to another. Examples of disputes that were considered not to be adequately addressed in PFIPs Instruments include regulator-operator disputes, and those between the SPV, its contractors and subcontractors (e.g. on design and construction elements). Such disputes could arise, in the post-award period, relating to the conclusion of project agreement and related agreements; the construction phase; the operation phase; and termination of the project.

46. The PFIPs Instruments were also considered as inadequately addressing the complexity of resolution mechanisms for disputes in PPPs: they do not emphasize adequately the crucial role of the governing law (and the choice of law during project formation), arbitration rules and dispute resolution forum, and their interaction.

47. The 2013 Colloquium, noting suboptimal outcomes in international arbitration, also urged a better balance in treating international arbitration and domestic dispute resolution. Multiple investment treaties, multiple international arbitration forums, cases and rulings and the poor enforcement of international arbitral awards were noted as key concerns. Building local capacity for local dispute resolution, it was stated, should be a focus in the PFIPs instruments. At the Congress, and subsequently, experts have advised the Secretariat that the increase in some forms of arbitration involving Governments should be reflected in a legislative text on PPPs; noting, however, concerns that some States prohibit arbitration involving the State

[9] See the Proceedings of the Congress, chapter V; available from www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf.

as a sovereign entity, and the relationship between any PPPs mechanism and investment regulation would need to be taken into account.

48. At the Congress, it was suggested that legislation for a "sound national regime for the prevention and resolution of disputes between regulator and operator" was needed. Although the essence of such a regime would build on the PFIPs Instruments, it was considered that the Legislative Guide focused on the mechanics of dispute resolution in an "abstract" way, and that the role of regulation in dispute prevention and resolution was underplayed.

49. Subsequently, and taking account of the above points, the suggestion has been expanded to state that such a regime for all elements of PPPs is required. Particular areas to this end, raised at the 2013 Colloquium, include: (a) Ensuring the necessary experience, skills and expertise of the judiciary to address complex issues in PPPs; (b) Addressing inefficiencies in court systems; (c) Addressing lack of independence; (d) Providing for effective accessibility (procedures may discriminate against foreign investors as opposed to national entities); and (e) Ensuring effective domestic enforcement of international decisions. The need for a settlement mechanism was referred to at the Congress and included as a relevant issue during the expert consultations prior to this forum. The Colloquium may consider that lessons from those States that have set up special fora to hear disputes should be taken into account (such experience being reported to the Secretariat as, at best, mixed).

50. A related aim of such a regime would be to avoid conflicting decisions and other issues arising out of parallel and concurrent disputes, so decisions by the body envisaged would need to bind all relevant parties and hence all interested parties should be able to participate. Conflicts of interest arising during proceedings, given the multiplicity of parties, would need to be addressed; ensuring independence in appointments to, the operation of, and appropriate standards of conduct within the entity likewise.

51. The Congress heard that model legislative provisions and/or legislative guidance should be considered by UNCITRAL to address these issues; the Colloquium may wish to consider those aspects that could be included in any future legislative text on PPPs.

5. Other topics

(i) Transparency

References: Legislative Recommendation 1

MLPs: Provision 1

Legislative Guide: Item A, "Introduction", in "Introduction and background information on privately-financed infrastructure projects"; Item B.1(a), "Transparency", Item D.2, "Arrangements for facilitating the issuance of licences and permits", Item E.5, "Regulatory process and procedures", all in Chapter I, "General Legislative and institutional framework"; Chapter III, "Selection of the concessionaire"; Item B, "Organization of the concessionaire", Item G, "Transfer of controlling interest in the project company", Item J.1(a), "Choice of sub-contractors", all in Chapter IV, "Construction and operation of infrastructure ..."; Item C, "Extension of the project agreement" and item D, "Termination", in

Chapter V, "Duration, extension and termination of the project agreement"; item B.9, "Tax law", and item 14, "Anti-corruption measures" in Chapter VII, "Other relevant areas of law"

52. The 2013 Colloquium noted the importance of ensuring transparency throughout PPP projects, and not just in the selection process. An example given was of the need for transparency in the transfer of resources from the public sector to the project operator during the operation period. This Colloquium may wish to note that the work of UNCITRAL on transparency in investor-State disputes contains discussions relevant to this topic. The UNCITRAL Rules on this topic are founded on the importance of transparency to good governance, a predictable regulatory framework and the importance of these elements in encouraging investment and hence sustainable development, the right of public access to information,[10] and the link to rules and procedures in public procurement and public financial management (as envisaged under UNCAC).

53. It has been acknowledged that although the PFIPs Instruments emphasize the general importance of transparency in the legislative framework, in regulatory and administrative processes and decisions, in the selection process (including as regards the treatment of unsolicited proposals), and in the operation of infrastructure, other references to transparency focus on a description of relevant provisions found in some national systems. Examples of the latter include transparency in project accounts, in administrative decisions on equity transfers, in any rules governing the choice of subcontractors and on extension of the concession period. Indeed, the only reference to transparency in the Legislative Recommendations and MLPs is in Recommendation 1, providing that the constitutional, legislative and institutional framework should ensure transparency (among other objectives).

54. The importance of transparency as a tool to ensure accountability and good governance has long been recognized and implemented in international texts on public procurement and PPPs. As noted above, it is a cornerstone principle of UNCAC. In the PPPs context, transparency is also critical for encouraging private participation in projects. The OECD principles referred to above state that the PPPs system "should ensure public awareness of the relative costs, benefits and risks of [PPPs], [and should include] active consultation and engagement with stakeholders as well as involving end-users in defining the project and subsequently in monitoring service quality".[11]

55. It has therefore been suggested that any future legislative text on PPPs should include more robust transparency provisions in all the above areas, in terms of model provisions rather than guidance alone. Transparency requirements in selection procedures can draw on work in public procurement and the current provisions in the PFIPs Instruments. As regards the planning stage of PPPs, public scrutiny of the decisions underpinning infrastructure plans and decisions on individual projects has been urged. For example, and as compared with traditional procurement, the "off-the-books" nature of some liabilities in PPPs has been stated to discourage responsible decision-making as regards fiscal sustainability and have

[10] A right recognized in international tribunals, such as in Claude Reyes v Chile (2006) (Inter-American Ct HR); Társaság V Hungary (2009) (ECtHR).

[11] Principle 1, OECD Principles for the public governance of PPPs, supra.

negative implications for future borrowing and investment abilities. The IMF has recommended disclosure requirements on financial aspects of PPPs;[12] it is suggested that this type of approach can support better decisions on fiscal matters.

56. Clarity as regards the socioeconomic and developmental goals being pursued through a PPP can assist in measuring whether or not those goals are met: also, as payments to the project operator are likely to be based on defined performance outcomes, transparency of the outcomes concerned is clearly needed for an objective evaluation of performance. The consultations prior to this Colloquium also emphasized that any future PPPs legislative text should consider the extent to which project agreements should be published as an aid to accountability. Issues surrounding contractual governance in a country have been cited as challenging in this context, as are necessary exemptions from disclosure. The discussions in UNCITRAL on exceptions to disclosure for commercial and other public interest reasons in the investor-State context may also provide useful parameters for assessing when information should not be disclosed in the PPPs context. In practical terms, also, commentators refer to the need to avoid what has been termed blanket publication of "zombie data",[13] which can in fact undermine accountability.

57. At the 2013 Colloquium, it was also suggested that UNCITRAL should encourage good governance by establishing a global transparency registry that would track operators' records, to be available for governments to consult when assessing potential partners.

58. The Colloquium may therefore wish to set out key aspects of transparency that it recommends should be included in any future legislative text on PPPs.

(ii) Other issues

59. Other topics that the experts indicate may require less significant revision in the PFIPs Instruments include the authority to engage in PPPs, insolvency and security interests following the issue of UNCITRAL texts on these topics,[14] and accounting and financial issues relating to fiscal sustainability, such as disclosure of PPPs and their contingent liabilities in government balance sheets (including rules to assist in the difficult task of assessing risk for this purpose).

6. Conclusions as to elements to be included in any new legislative text on PPPs

60. The 2013 Colloquium and consultations since the 2013 Commission session have indicated that the experts broadly agree on the main recommended topics for revision in PFIPs Instruments.

61. The Colloquium may therefore wish to assess and report on the scope of work required for those topics and others it considers relevant. It may also wish to provide an indication of the likely extent and time frame for a work programme to

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[12] See PPPs, Government Guarantees and Fiscal Risk, IMF, 2006, available at www.imf.org/External/Pubs/NFT/2006/ppp/eng/ppp.pdf.

[13] Referred to in "Public-Private Partnerships (PPPs) in International Development: Are we asking the right questions?", CAFOD, 2013, available at www.cafod.org.uk/curation/search?SearchText=ppps.

[14] See the post-2003 texts available at www.uncitral.org/uncitral/uncitral_texts/insolvency.html and www.uncitral.org/uncitral/en/uncitral_texts/security.html.

develop a legislative text including the topics concerned, and allowing for additional aspects to emerge. In its report, the Colloquium may also consider it appropriate to set out the assumptions upon which these conclusions are based, as well as relevant contingencies.

62. In addition, and noting the preliminary nature of the research and studies carried out to date, the Colloquium may consider that its recommendations should emphasize that any mandate given should be sufficiently flexible to allow a legislative text to be developed without further or repeated referrals to the Commission to amend the mandate as issues are developed.

C. Nature of any legislative text to be recommended

63. At the 2013 Colloquium, the prevailing view was that the desired legislative solution for any future work on PPPs would be a Model Law, because it would provide a relatively easy-to-use framework for legislators and would encourage a good level of predictability and security in the legal framework (reducing susceptibility to political change where PPPs are regulated through guidance only, for example). Noting that not all issues are susceptible to legislative solution, that Colloquium encouraged UNCITRAL to be clear about the aspects of PPPs suitable for a Model Law and those to be addressed in accompanying guidance or other forms of regulation. In addition, the Colloquium noted that the benefits of a Model Law include that it provides a flexible, non-prescriptive text, with best practice upon which there is international consensus, covering all essential provisions for (in this case) the types of PPPs regulated. Such a Model Law would identify minimum requirements for each project (that is, those for which a legislative solution is appropriate) and which provisions are required but should be drafted on a project-by-project basis. In addition, the Colloquium emphasized that an accompanying Guide to Enactment would be critical to provide for the effective implementation and use of the Model Law, but also to explain options and possible deviations from the text.

64. The alternative view, updating the Legislative Guide rather than drafting a Model Law, also received some support at the Colloquium. Reasons for so doing included historical political resistance to UNCITRAL's engaging in areas beyond its core competence (such as institutions in enacting States), concerns about the complexity of the subject, and the need to preserve significant flexibility. Here, it was noted that the analytical guidance that a Legislative Guide could provide would assist in identifying and overcoming obstacles to effective PPPs.

65. The form of a desirable legislative text on PPPs was therefore an important element of the consultations prior to this Colloquium. While the majority of experts continue to recommend a Model Law and accompanying Guide to Enactment, the following concerns have been raised about seeking to produce a Model Law. They can be separated into concerns about model laws generally, and PPP-specific concerns.

66. The main concerns raised about model laws generally revolve around the difficulty of tailoring them to suit local circumstances, without compromising their usefulness and, on the other hand, the temptation to copy a model law into local law without such tailoring. Although these issues appear diametrically opposed, they

both raise questions of transferability: does the legal, social, economic, cultural and political context render the use of a model law ineffective? The Colloquium may wish to consider UNCITRAL's experience in promoting and supporting the use of model laws in various subjects in considering this question, such as the recent experience in issuing much more comprehensive Guides to Enactment of UNCITRAL's more recent Model Laws

67. On the question of institutions in an Enacting State, UNCITRAL's recent experience in insolvency, public procurement and secured transactions,[15] as well as the consultations prior to this Colloquium, indicate that domestic institutions, previously considered politically sensitive and possibly outside UNCITRAL's core areas of competence are now accepted as part of UNCITRAL's remit.

68. On the question of PPP-specific concerns, the following issues were raised:

That the selection process, if based in traditional procurement procedures, would be insufficiently flexible for a PPP. Here, the Colloquium may wish to consider both the comments made at the 2013 Colloquium on this question, and the issues set out in the section on Selection procedures, above;

That modern PPPs laws include provisions on the prioritization and development of projects and other aspects of planning, which would be difficult to incorporate in a Model Law on PPPs. Again, the Colloquium may wish to consider the issues set out above, in the section on Project planning and preparation, above;

That combining general concern about "cutting and pasting" into a Model Law and the need to take account of a wide range of other relevant laws in PPPs would risk an incoherent and ineffective legislative framework. Here, the Colloquium may wish to separate the laws that would be relevant to all large infrastructure projects, and those arising in the PPPs context. The former must be taken into account in public procurement and are therefore addressed in UNCITRAL's work on that topic (including in the Guide to Enactment to the Model Law on Public Procurement), and have not previously been subject to the same concern. The latter may include constitutional law, privatization laws, corporate law, secured interests law, insolvency law, changes in legislation, and issues arising out of long-term contracts (e.g. variations in contractual terms), and financial and investment issues. Many of these issues are addressed in the current Legislative Guide as noted in the section on Other relevant laws above, and the Colloquium may consider that they would remain issues of guidance rather than for a Model Law. If so, the question becomes whether these topics are so significant that a Model Law would cover an insufficient area of PPPs to be effective.

69. The report of the 2013 Colloquium also noted the non-binding nature of model laws, legislative guides and guides to enactment, and concluded that updating the Legislative Guide alone would not provide the easy-to-use framework referred to above.

70. This Colloquium may wish therefore to consider this question anew: the lack of consensus on the type of legislative text recommended is one of the issues that

[15] See, also, 2013 Colloquium Discussion Paper, supra, para. 35.

the Commission relied upon when instructing the Secretariat to engage in further preparatory work before the Commission would decide on the referral of PPPs as a topic to a Working Group.

D. Importance of possible future work on PPPs

71. The Commission agreed with the conclusion of the 2013 Colloquium that PPPs have become an important tool "in securing resources for infrastructure and other development, at the international and regional levels and for States at all stages of development".[16] The Commission's sentiments echo statements from heads of State and Government and high level representatives made at the United Nations Conference on Sustainable Development in 2012 (the "Rio +20 Summit"), acknowledging "that the implementation of sustainable development will depend on active engagement of both the public and private sectors" and recognizing "that the active participation of the private sector can contribute to the achievement of sustainable development, including through the important tool of public-private partnerships".[17] The Rio + 20 declaration:

> Stated that "we reaffirm that international trade is an engine for development and sustained economic growth, and also reaffirm the critical role that a universal, rules-based, open, non-discriminatory and equitable multilateral trading system, as well as meaningful trade liberalization, can play in stimulating economic growth and development worldwide, thereby benefiting all countries at all stages of development, as they advance towards sustainable development. In this context, we remain focused on achieving progress in addressing a set of important issues, such as, inter alia, trade distorting subsidies and trade in environmental goods and services";[18] and
>
> Declared support for "national regulatory and policy frameworks that enable business and industry to advance sustainable development initiatives taking into account the importance of corporate social responsibility."[19]

72. At the Commission session in 2013, delegations emphasized that promoting sustainable economic and social development and the rule of law were important when assessing the priority to be ascribed to topics.[20] As noted above, the importance of PPPs in enabling pro-poor projects and social responsibility, as well as more general sustainable development issues, were emphasized at the 2013 Colloquium.

73. As noted in Part I of this paper, the Commission will consider whether or not to grant a mandate for legislative development in PPPs not only on the basis of the technical merits of a recommendation to this end, but also by reference to other work recommended. At the last two Commission sessions, in 2012 and 2013, it has noted the following points regarding prioritization of topics:

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[16] Report of 46th session, document A/68/17, para. 36.

[17] Para. 46 of "The future we want", adopted in Rio de Janeiro on June 22, 2012 at the Rio+20 Summit, G.A. Res. 66/288, available at www.un.org/en/sustainablefuture/.

[18] Ibid., para. 281.

[19] Ibid., para. 46.

[20] Report of 46th session, supra, para. 297.

The importance of identifying potential users of a text if developed;

The need to articulate the importance of the development of a text and of UNCITRAL's undertaking the work within the United Nations context;

The desirability of a strategic approach to responding to global events, developments in technology, and changes in commercial trends (citing examples of various means of engaging private capital for satisfying public needs, for example through public-private partnerships and private sector provision of State services, financial contracts and consumer insolvency);

The need to specify the priority that States attach to that work;

The need to quantify the economic impact or necessity of that work;

Avoiding the creation of de facto permanent Working Groups;

Allowing for the flexibility UNCITRAL needs to preserve to adapt to newly emerging priorities; and

Examining the work of other organizations that might be relevant to topics under consideration for future work by the Commission.[21]

74. At its session in 2013, the Commission emphasised that "the extent to which an envisaged legislative text would support the development of international trade law as expressed in the mandate given to UNCITRAL by the General Assembly should be the main factor guiding the Commission in deciding whether or not to take up a topic."[22] Applying its general considerations to future work, the Commission stressed in the context of issuing a mandate to Working Group I the importance of addressing "legal obstacles faced by micro-, small- and medium-sized enterprises throughout their life cycle and, in particular, those in developing economies" (see, further, the sections on PPPs with small private operators in Part I of this paper, and on Domestic preferences, above.[23]

75. The Colloquium may wish to assist the Commission in its deliberations by setting out relevant factual considerations pertaining to these issues in its report.

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[21] See the following documents for the Commission's 45th session in 2012: "A strategic direction for UNCITRAL", document A/CN.9/752, paras. 19-22, available at www.uncitral.org/uncitral/commission/sessions/45th.html and A/CN.9/752/Add.1, para. 24 (available at the same location), which noted "the role and relevance of UNCITRAL both within the United Nations and in the field of international trade and commerce. UNCITRAL's role and relevance can be assessed by reference to the work and priorities of the United Nations, donor communities and priorities of national governments. Key developments, such as the Paris Declaration on Aid Effectiveness (2005), and major international issues of concern — anti-corruption agenda, 2008 global financial meltdown, conflict/post-conflict situations — will shape the priorities of these bodies". See, also, section IV.B ("Prioritization of subject areas") in "Planned and possible future work", a document for the 46th session in 2013, document A/CN.9/774, available at www.uncitral.org/uncitral/commission/sessions/46th.html.

[22] Report of 46th session, supra, para. 297.

[23] Ibid., para. 321.